2014 WL 1496243 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

Anthony P. SHARP, Jr., Appellant (Defendant Below),
v.
STATE OF INDIANA, Appellee (Plaintiff Below).

No. 20A04-1310-CR-501.
February 24, 2014.

Appeal from the Elkhart Circuit Court,
Cause No. 20C01-1210-MR-4,
Hon. Terry C. Shewmaker, Judge.

Brief of Appellee

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III. Whether Sharp's advisory sentence is inappropriate to his offense and character.

STATEMENT OF THE CASE

On October 9, 2012, the State charged Appellant, Anthony P. Sharp, Jr. ("Sharp") and several others with felony murder (App. 11). [1] Sharp and his co-defendants were tried to a jury from August 19, 2013, through August 22, 2013, and found guilty (Tr. 1283). The ***2** trial court sentenced Sharp on September 12, 2013 to an advisory sentence of fifty-five years in the Department of Correction (App. 98-103).

On October 4, 2013, Sharp filed a notice of appeal (Docket; App. 109). The notice of completion of the clerk's record was issued on October 21, 2013 (Docket; App. 1). The notice of completion of the transcript was issued on December 23, 2013 (Docket; App. 130). Sharp filed his brief on January 22, 2014, serving the State by mail (Docket; Brief of Appellant, 36).

STATEMENT OF THE FACTS

On the morning of October 3, 2012, Jose Quiroz was at his residence at 1922 Frances Avenue in Elkhart with Blake Layman and Levi Sparks (Tr. 604, 715, 719, 930-31; Exhibit 40). They decided to commit a burglary and to scout the neighborhood looking for homes that were not occupied (Tr. 930-31). Quiroz later explained that burglarizing an occupied home is more dangerous because the presence of a homeowner can result in injuries and more severe legal consequences (Tr. 884). They walked north from Quiroz's residence to Tracy's Lehman's house at 1904 Frances Avenue (Tr. 603-04, 608, 754; Exhibit 8 & 9). Lehman later recounted that she was taking a bath upstairs in her home when she heard's knock on her front door (Tr. 755-57). Later investigation showed that Sparks had knocked on the door (Tr. 931; Exhibit 40). Lehman'S dogs barked, and Lehman heard one or more people pacing on her front porch (Tr. 755-57). Lehman heard a second knock on her door while the dogs continued barking, and after some time she heard the sound of people leaving her front porch (Tr. 755-57). Sparks told Quiroz that the house was not a proper target for a burglary, "Because of the dogs" (Tr. 933). The group checked, and then discounted, a second target house because someone was home (Tr. 933).

***3** Michael Couch lived at 1920 Roys Avenue, which was on the same block and slightly southwest of Rodney Scott's house on 1919 Frances Avenue (Tr. 604-05, 749-49, 1059; Exhibits 8 & 9). At approximately 2:20 p.m., Couch saw two of the group walk through the alley separating Couch's and Scott's house (Tr. 747). They disappeared from Couch's view behind a garage, and then reappeared walking north until they left the alley and walked between Scott's house and the house of Scott's next-door neighbor, Julia Leazenby, at 1913 Frances Avenue (Tr. 748-49, 603, 953).

Rodney Scott had been laid off from his regular employment (Tr. 1064-65). He had awakened at approximately six o'clock that morning and watched television in the downstairs portion of his house until nine o'clock, when he became sleepy and returned to his upstairs bedroom (Tr. 1064-65). Scott used a powered breathing mask to sleep, and later recounted that the construction and layout of his house and its front porch meant that persons upstairs could not always hear someone knocking on the front door (Tr. 1065-66). The doorbell to Scott's home was not functioning; Scott had installed a wireless doorbell, but it only chimed on the first floor of the residence (Tr. 1066).

Quiroz, Layman and Sparks decided to target Scott's house for the burglary (Tr. 930-31, 934, 1045). Quiroz later recalled that they summoned Sharp and his cousin, Danzele Johnson, to "help... get into the house" (Tr. 934). Sharp and Johnson arrived and spent some time socializing with Quiroz, Layman and Sparks (Tr. 721-22). They were present when Quiroz's mother, Rebecca McKnight, left the residence to lunch with a friend (Tr. 723). McKnight later recalled that they were also on the porch of the house (Tr. 723, 942). Sharp later told police that during this meeting Quiroz and Johnson discussed where the money was and

where the police were (Tr. 972). The group left to burglarize Scott's house ***4** (Tr. 935-36). Sparks later explained that he remained outside Scott's residence with a cell phone in the event that the police or visitor arrived at Scott's house (Tr. 582-83, 943; Exhibit 14A). Quiroz was also equipped with a cell phone (Tr. 944).

Quiroz, Layman, Johnson and Sharp entered Scott's home by kicking the rear door to Scott's kitchen (Tr. 653-54, 831, 854, 935-36, 1043; Exhibits 17 & 18). That door was made of steel and Scott kept it locked when he was sleeping (Tr. 1061-63). The force of the entry ripped enough of the door's frame away to allow entry through the doorway into the kitchen (Exhibits 17-19). The group began looking for things to steal (Tr. 935-36). A knife block was in the kitchen (Tr. 655-56, 1088-89; Exhibits 20-22). Scott later recounted that he did not use the knives in that knife block and described the knives and block as a "waste of money" (Tr. 1088-89). They took Scott's watch and his wallet from the kitchen counter near the knife block (Tr. 678-80, 682, 1090; Exhibits 37, 38A & 38B).

Scott, who had been upstairs sleeping, awoke and looked at a clock, which told him that it was 2:30 p.m. (Tr. 1067). Scott later recalled, "As soon as I sat up on the side of the bed, there was this boom, and my whole house just shook" (Tr. 1067). Scott heard a second loud booming noise and felt another vibration (Tr. 1068). He picked up a cell phone and suddenly remembered that a burglary had occurred in the neighborhood earlier that week (Tr. 1068). [2] Scott retrieved a handgun from his bedroom and opened the door (Tr. 1072). After seeing that no one was outside his bedroom Scott, who weighed approximately 270 pounds, decided to go loudly down the wood stairs in case there were burglars inside the first floor of his home (Tr. 1072). Scott went down the stairs and strode through the living room of his house, looking to see if anyone was on the first floor (TR. 1074).

***5** When Scott walked to the dining room, he saw someone in his kitchen turning around and fleeing out the back door of the house (Tr. 1073-74). Scott saw two burglar standing at the door to the bedroom adjacent to Scott, who was between them and the kitchen exit door (Tr. 1074). Scott, who was holding his handgun down at his side, was afraid of being hurt or killed (Tr. 1075, 1106). Scott did not know if the burglars were armed (Tr. 1075). He decided to frighten them immediately and cause them to remain in the bedroom, before they attacked him and before the man who had fled from his kitchen could return (Tr. 1075, 1077). Scott began firing his handgun, aiming low in the area of the floor (Tr. 1077, 1109). A later examination of Scott's residence confirmed that his shots struck several locations that were approximately one to two feet from the floor (Tr. 661-62, 664, 666, 669, 672-74; Exhibits 25, 27, 30 & 32).

The two burglars in Scott's view fled into the bedroom's closet and closed the door behind them (Tr. 1079). Scott used his cell phone to call 911 (Tr. 1079). After the dispatcher told Scott that the police were en route, the closet door opened (Tr. 1080). Scott shouted, "Keep the door closed" and "Don't open up that door" (Tr. 1080). The door opened again and Scott saw one of the burglars go to the floor (Tr. 1080). Quiroz told Scott that the burglar who had fallen to the floor had been shot (Tr. 1080). Scott relayed this fact to the dispatcher and requested an ambulance (Tr. 1080). At this point, Scott later explained, he recognized Quiroz as a neighbor because, "I watched him grow up. I watched his family move into that house" (Tr. 1084). Scott addressed this fact to Quiroz, but Quiroz claimed he was not from the area (Tr. 1084).

A third man, who Scott had not seen before, emerged from the closet, holding his leg and asking if he could sit on the bed (Tr. 1082). That man was later identified as Layman ***6** (Tr. 720-21, 833, 854, 1038, 1082). Scott refused to allow the man out of the closet and told him to remain where he was (Tr. 1082). Quiroz put his head out of the closet and Scott told Quiroz to remain where he was (Tr. 1084). The police arrived and entered the house (Tr. 1085). Scott put his handgun down and said, "They're right there in the bedroom by the closet" (Tr. 1085).

Suddenly, Scott later recalled, Quiroz "flew out of the closet, pushed over the armoire that was in front of the window, went over the top of the two that was there on the floor, and just crashed through the window" of the bedroom (Tr. 536, 958-59, 1085; Exhibits 13, 30). The officer turned and left the house in pursuit of Quiroz (Tr. 1087). The dispatcher told Scott to exit the house (Tr. 1087-88). Scott followed the dispatcher's directions and those of other officers and was recovered safely (Tr.

571-72, 1087-88). Officers entered the house and arrested Layman, who was treated for a leg wound (Tr. 577-78, 1038; Exhibit 10). Johnson died at the scene from a gunshot wound (Tr. 665, 670-71, 831, 936, 1092; Exhibits 10, 31-32).

Carol Black was driving a school bus carrying dozens of children who had been dismissed for the day from nearby Hawthorne Elementary School (Tr. 765). As her bus stopped neared the intersection of Frances and Blaine Avenues, Black saw a police cruiser drive past her bus (Tr. 768). After the police cruiser had left the area, Black saw a white male with short hair walking north on Roys Avenue across Blaine Avenue (Tr. 769; Exhibit 1). Black noticed that the white male kept looking behind him until he had crossed Blaine Avenue, at which point he began running away (Tr. 769). The white male was Sparks, who had abandoned his cell phone at the scene of the burglary (Tr. 581-83, 943-44; Exhibits 2-3, 10). As Black continued her route by driving down Blaine Avenue, she saw Quiroz, who ***7** she saw was a dark-complected male, emerge from an alley and run past her bus before turning onto Roys Avenue (Tr. 549-51, 770; Exhibit 10). Two police officers were pursuing this man (Tr. 770).

The man was Quiroz, and the officers were Elkhart Police Corporal James Ballard and Corporal Florea, who had responded to the dispatch of a burglary with shots fired (Tr. 542, 546-47). They had chased Quiroz on foot and in a police cruiser through alleys and yards in the area (Tr. 549-51). They apprehended Quiroz as he was running back toward Frances Avenue (Tr. 549-51). Officers saw that Quiroz's hands and arms were covered in blood, and the blood on Quiroz was inconsistent with the small cuts he had on his hands (Tr. 551-52).

Unlike Quiroz and Sparks, Sharp fled to the south of Scott's residence (Tr. 549-51, 621-22, 657, 769, 994; Exhibit 10). Sharp had fled while holding a knife he had taken from the knife block in Scott's kitchen (Tr. 602-03, 653, 1090). This was determined by the fact that Peter Campiti, a neighbor who lived south of Scott's house, found a knife laying in his backyard on the day of the burglary (Tr. 602-03, 615, 622). The knife had not been there before (Tr. 615, 622). Campiti reported finding the knife to police, who took it into evidence (Tr. 649; Exhibit 11). The knife was the same shape, color and style to the knives the knife block in Scott's kitchen (Tr. 649, 655-57; Exhibits 11, 21-22). It was the only knife missing from Scott's knife block (Tr. 1088-1090).

SUMMARY OF THE ARGUMENT

I. The evidence is sufficient to prove that Sharp participated in the burglary that resulted in death, as required to prove Sharp's guilt for felony murder. Sharp's argument merely asks this Court to reweigh and redetermine the credibility of evidence given by Jose

***8** Quiroz, who participated in the burglary and identified Sharp as one of the burglars. This Court should decline Sharp's invitation.

II

Assuming he has not waived the isue, this Court should not disregard the precedent of our Supreme Court and the language of the felony-murder statute and rule that Sharp's conduct was not chargeable under that statute. Sharp has waived his invitation to reinterpret the felony-murder statute to require that the defendant have deliberately sought out an armed confrontation, or to require that the defendant's own actions have caused death, before guilt attaches under that statute. Sharp did not file a motion to dismiss the information, which does not contain allegations of this sort, or challenge the jury instructions, which also do not require this proof. Even if he had preserved the issue, Sharp's invitation to reinterpret the statute asks this Court to ignore the binding precedent of our Supreme Court and the statute's plain language; this Court should decline Sharp's invitation.

III.

Sharp's advisory sentence is not inappropriate to his offense and character. Sharp has failed to carry his heavy burden of showing that the advisory sentence he received is inappropriate. The nature of the offense does not warrant anything less than the advisory sentence. Sharp's characterization of his participating in the offense as ‘minimal’ is not supported by the record. As an adult,

Sharp assisted juveniles in committing the burglary, which was well-planned and coordinated with lookouts and cell phones. Once he had entered Scott's house, Sharp armed himself with a deadly weapon, a knife he took from the kitchen. Sharp's character is demonstrated by his repeated contacts with the juvenile justice system, drug use (including the use of drugs on the day of the offense) and willingness to assist juveniles in committing a serious offense.

***9 ARGUMENT**

I. THE EVIDENCE IS SUFFICIENT TO PROVE THAT SHARP PARTICIPATED IN THE BURGLARY THAT RESULTED IN DEATH, AS REQUIRED TO PROVE SHARP'S GUILT FOR FELONY MURDER.

In examining the sufficiency of the evidence, this Court will not re-weigh evidence or re-evaluate the credibility of witnesses. *Kiplinger v. State*, 922 N.E.2d 1261, 1266 (Ind. 2010); *Dillard v. State*, 755 N.E.2d 1085, 1089 (Ind. 2001). This Court "will consider only the evidence most favorable to the judgment and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment." *Hoover v. State*, 918 N.E.2d 724, 731 (Ind. Ct. App. 2009). The evidence need not be sufficient to overcome reasonable hypotheses of innocence. *Craig v. State*, 730 N.E.2d 1262, 1266 (Ind. 2000). To the contrary, this Court will only overturn a verdict if it finds that, after considering the evidence and inferences supporting the conviction, "no rational fact-finder" could have found the defendant guilty. *Matthews v. State*, 718 N.E.2d 807, 810-11 (Ind. Ct. App. 1999). Sharp has not shown that the evidence is insufficient to sustain his conviction.

Sharp incorrectly claims that the evidence is insufficient to prove that Sharp was one of the burglars who broke and entered Scott's house (Brief of Appellant, 15). Sharp concedes that Quiroz identified him as one of the burglars (Brief of Appellant, 15). Nonetheless, Sharp claims that while "a conviction may rest solely on the testimony of a sole witness," this Court may reassess "the caliber and quality" of the witness and overturn a conviction (Brief of Appellant, 15). Sharp then re-presents the cross-examination and jury arguments of defendants' counsel to the effect that Quiroz's identification was unreliable (Brief of Appellant, 13-15) (Tr. 858, 863-64, 889, 1212, 1219-22). In the course of this ***10** argument, Sharp insists that Quiroz's evidence was not corroborated, and that therefore his conviction should be overturned (Brief of Appellant, 14). Sharp's argument is without merit. One of the cases on which Sharp attempts to rely, *Thompson v. State*, 61 N.E.2d 1165 (Ind. 1996), gives a full statement of the rule in this regard: A murder conviction may rest solely on the uncorroborated testimony of a single witness. *Id.* at 1167; *see also Seketa v. State*, 817 N.E.2d 690, 696 (Ind. Ct. App. 2004) (holding, "the uncorroborated testimony of a single witness is sufficient to sustain a conviction on appeal").

The alleged absence of corroboration for Quiroz's identification of Sharp is inconsequential to a review of the evidence on appeal. *Id.* The credibility and weight of Quiroz's evidence was for the jury alone, for only the jury was "entitled to determine which version of the incident to credit." *Scott v. State*, 867 N.E.2d 690, 696 (Ind. Ct. App. 2007), trans, denied. "Not only must the fact-finder determine whom to believe, but also what portions of conflicting testimony to believe." *Atwood v. State*, 905 N.E.2d 479, 484 (Ind. App. 2009), *trans, denied* (quoting *In re J.L.T.*, 712 N.E.2d 7, 11 (Ind. Ct. App. 1999)). The jury was the sole judge of the effects which any discrepancies or contradictions might have had on the outcome of the case. Murray v. State, 761 N.E.2d 406, 409 (Ind. 2002). Sharp's argument merely invites this court to re-evaluate Quiroz's credibility and reweigh his testimony (Brief of Appellant, 13-15). This Court should decline Sharp's invitation. *Kiplinger v. State*, 922 N.E.2d 1261, 1266 (Ind. 2010).

Even if Sharp had argued some authority for the idea that Quiroz's evidence must be corroborated, Sharp's complaint would still be without merit. Sharp told police that he and Johnson had gone to Quiroz's residence in response to a message from Quiroz summoning them there (Tr. 970). This corroborates Quiroz's evidence that he summoned them to "help ***11** ... get into the house" (Tr. 934). These facts are also corroborated by Quiroz's own mother, who testified that Sharp and Johnson were present at her house (Tr. 723). Sharp later told police that during this meeting Quiroz and Johnson discussed where the money was and where the police were, which also corroborates Quiroz's evidence that he had summoned Johnson and Sharp to participate in a burglary (Tr. 972).

The uncontradicted evidence is that Scott encountered four burglars in his home; one fled out the kitchen door, and three fled into the bedroom closet (Tr. 1073-74, 1079, 1082). The evidence is also uncontradicted that the men who remained in Scott's bedroom closet were Quiroz, who is Hispanic, Layman, who is white, and Johnson who is black (Tr. 547, 551, 577-78, 665, 670-71, 769, 831, 936, 1038, 1084, 1092; Exhibits 10, 31-32). Shortly after a police car had passed her school bus, Carol Black saw a white male, who could not have been Layman or Sharp, walking to the north and glancing behind him before he took off running (Tr. 769-70; Exhibit 1). This man's location and behavior corroborates Quiroz's evidence that Sparks was the lookout (Tr. 935).

A knife stolen by the burglars from Scott's knife block was found to the south, in Peter Campiti's back yard (Tr. 602-03, 615, 622, 653, 1088-89; Exhibits 11, 21-22). The men Scott confined in his bedroom closet could not have left it there; two of the men remained at the scene, and Quiroz fled in a different direction from Campiti's yard (Tr. 550-51, 577-78, 615; Exhibits 1 & 9). Sparks did not abandon the knife in Campiti's yard, because Sparks was also traveling in a different direction (Tr. 769-70; Exhibit 1). These facts corroborate Quiroz's evidence -- and Sharp's own statement to police -- that Sharp was one of the men who entered Scott's house (Tr. 582-83, 934-36, 943).

***12** The jury also heard testimony from April McKeown, a teacher at Concord High School (Tr. 985). McKeown had come to know Sharp while he was a student, and developed a mentoring relationship with him that continued after Sharp left school until the time of trial (Tr. 986-88). Sharp, who was also known as “Ant,” had obtained McKeown's cell phone number and regularly used it to send her messages (Tr. 988-90, 991). Quiroz had also stated that Sharp's nickname was “Ant” (Tr. 929-30). McKeown told the jury that Sharp had texted her on the afternoon of October 3, 2012 (Tr. 991-93).[3] Sharp texted her saying, “Hey, can u pick me up?? m I really need uJus got shot” (Tr. 1001; Exhibit 39). Later Sharp texted her, “can you take me to the hospital please im beggin you” (Tr. 1001; Exhibit 39). McKeown texted Sharp back, “Call 911. Im still at work. Where r u?” (Tr. 1001; Exhibit 39). Sharp replied, “Nanhh nahh forget ill find a way” (Tr. 1001; Exhibit 39). Sharp then texted McKeown, “its all badd: (((. Its my time...Bye” (Tr. 1001; Exhibit 39). McKeown replied, “This is not funny!” (Tr. 1001; Exhibit 39). Sharp texted McKeown: “Imm either dying today or going to jail I can jus fill [feel] it” (Tr. 1003, 1007; Exhibit 59). McKeown replied, “Oh anthony. What have u gotten yourself into” (Tr. 1003; Exhibit 39).

A rational juror could find that this evidence shows that Sharp believed that “its all badd” and that he would either die or go to jail on October 3, 2012, because he participated in the burglary; stole the knife missing from Scott's knife block; and fled when Scott confronted the burglars, eventually abandoning the knife in Campiti's yard (Exhibit 39). Sharp's contrary claim that his participation in the burglary rests “solely on the testimony of ***13** a single witness” are contradicted by the record (Brief of Appellant, 15). Sharp's conviction should be affirmed. *Matthews*, 718 N.E.2d at 810-11.

II. Assuming he has not waived the issue, this Court should not disregard the precedent of our Supreme Court and the language of the felony-murder statute and rule that Sharp's conduct was not chargeable under that statute.

Sharp's second issue advances two distinct challenges to his conviction. He first claims that the evidence is insufficient to prove foreseeability in his case under a new standard of foreseeability which he claims makes the evidence insufficient (Brief of Appellant, 16-18). Sharp then argues that our Supreme Court's interpretation of the felony- murder statute is wrong and that only persons who commit murder during the commission of a felony should be liable for a felony murder conviction (Brief of Appellant, 19-20). To the extent Sharp's arguments may be read to attack the sufficiency of the evidence, the State would refer to its summary of the standard of review in Part I of this Brief, supra. Questions of law which have been preserved for appeal are reviewed de novo. *Hale v. State*, 992 N.E.2d 848, 852 (Ind. Ct. App. 2013). Sharp has waived his present arguments. Even if he had not waived them, they are without merit.

A). Sharp has waived review of his claim that the felony-murder statute. should be reinterpreted.

Because both of Sharp's claims rely on his contention that his conduct is not punishable under the felony murder statute, they are claims that the "facts stated do not constitute an offense," which is a ground for a motion to dismiss under Indiana Code Section 35-34-1-4(a)(5) (Brief of Appellant, 16-18, 19-20). *See Wine v. State*, 637 N.E.2d 1369, 1373-74 (Ind. Ct. App. 1994) (holding a claim that the charged conduct fails to state an offense is a proper grounds for a motion to dismiss). Such claims are waived when, as ***14** here, they are raised for the first time on appeal. *Id.; Sewell v. State*, 973 N.E.2d 96, 101 (Ind. Ct. App. 2012); *Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004). It should also be noted that Sharp did not present these arguments to the trial court regarding the instructions on the elements of his offense, which do not contain Sharp's new standards of proof (Tr. 1140-46, 1263-65). Sharp has therefore waived review. *Id.; see Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010) (failure to object to illegally-seized evidence waives review) *and Wells v. State*, 441 N.E.2d 458, 463 (Ind. 1982) ("Error can only be predicated on questions presented to and ruled upon by the trial court"). [4]

The State acknowledges that this Court has addressed waived claims that might have led to the dismissal of informations in the context of constitutional challenges, *Sewell*, 973 N.E.2d at 101; *Price v. State*, 911 N.E.2d 716, 719 & n.2 (Ind. Ct. App. 2009), trans. denied., or instances in which our Supreme Court has previously sanctioned the retroactive application of a new statutory interpretation. *Lawrence v. State*, 665 N.E.2d 589, 592 (Ind. Ct. App. 1996). The concerns prompting review in such cases do not operate when a defendant merely claims his charged conduct should not be within the definition of an existing offense -- that claim should be waived by failure to file a motion to dismiss. *See Burgess v. State*, 461 N.E.2d 1094, 1098 (Ind. 1984) (refusing to review waived claim that a charge was invalid). Sharp's brief does not make any constitutional argument, and does not rely on the previously-sanctioned retroactive application of a new rule (Brief of Appellant, 16-18, 19-20). This Court should emphasize its warning to defendants not to raise ***15** challenges to the legal sufficiency of a charge for the first time on appeal -- when the times to amend the information and offer additional evidence, or seek pretrial clarification via an interlocutory appeal have already passed -- and refuse to address Sharp's claims that the felony-murder statute should be reinterpreted as to foreseeability, or as to who may be held liable for the offense. *See Sewell*, 973 N.E.2d at 101 ("We reiterate our warning to defendants that cases in which we have addressed the merits of the challenge notwithstanding the waiver, should not be viewed as an 'invitation to **neglect** to file a motion to dismiss and then argue for the first time on appeal ..." (quoting Price, 911 N.E.2d at 719 n.2); cf. *Bunting v. State*, 854 N.E.2d 921, 924 (Ind. Ct. App. 2006) ("A party may not sit idly by, permit the court to act in a claimed erroneous manner, and subsequently attempt to take advantage of the alleged error").

B). Sharp's reinterpretation of the 'foreseeability' requirement for a felony-murder conviction is contrary to binding precedent.

The felony murder statute provides: "A person who... [k]ills another human being. while committing or attempting to commit. burglary... commits murder, a felony." Ind. Code § 35-42-1-1(2). Our Supreme Court has held that the statutory language "kills another human being -while committing" does not restrict the felony murder provision only to instances in which the felon is the killer, but may also apply equally when, in committing a offense, the felon contributes to the death of any person. *Palmer v. State*, 704 N.E.2d 124, 126 (Ind. 1999). Our Supreme Court has repeatedly reaffirmed this holding. *Pittman v. State*, 885 N.E.2d 1246, 1258 (Ind. 2008); Lacey v. State, 755 N.E.2d 576, 578 n. (Ind. 2001); *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000). In Palmer, supra, our Supreme Court approvingly quoted this Court's observed that under the felony murder statute:

> ***16** [A] person who commits or attempts to commit one of the offenses designated ... is criminally responsible for a homicide which results from the act of one who was not a participant in the original criminal activity. Where the accused reasonably should have ... foreseen that the commission of or attempt to commit the contemplated felony would likely create a situation . which would expose another to the danger of death at the hands of a nonparticipant in the felony, and where death in fact occurs as was foreseeable, the creation of such a dangerous situation is an intermediary, secondary, or medium in effecting or bringing about the death of the victim. There, the situation is a mediate contribution to the victim's killing.

Palmer, 704 N.E.2d at 126 (quoting *Sheckles v. State*, 684 N.E.2d 201, 205 (Ind. Ct. App. 1997)). In this context, "foreseeability" is not mens rea; the defendant need not have acted with the intent, or while aware of a high degree of probability, that death would result. See Pittman, 885 N.E.2d at 1258 (holding felony murder "requires no proof of mens rea other than that required for the underlying crime, in this case burglary"). Guilt is proved by evidence from which a jury may find that the defendant's conduct "raised the foreseeable possibility" of death. *Palmer*, 704 N.E.2d at 126.

So, for example, in Jenkins, supra, victim of a robbery, expecting to be killed, seized a gun belonging to Thomas, the other robber, and used it to shoot Thomas accomplice seven times, killing him. Jenkins, 726 N.E.2d at 271. Our Supreme Court held that Jenkins was guilty of felony murder because: "The evidence and reasonable inferences establish that the defendant and his co-perpetrator engaged in dangerously violent and threatening conduct and that their conduct created a situation that exposed persons present to the danger of death at the hands of a non-participant who might resist or respond to the conduct." *Id.* In Palmer, the defendant accompanied Williams to meeting with Williams' parole officer. *Id.* at 125. When officers attempted to arrest Williams, Palmer produced a handgun and eventually fired it at a police officer, injuring that officer. Id. Another officer responded by firing his own handgun, killing Williams." *Id.* Our Supreme Court held that Palmer's ***17** pointing and firing the gun at the first officer "clearly raised the foreseeable possibility that the intended victim might resist or that [other] law enforcement [officers] would respond, and thereby created a risk of death to persons present" and that this conduct was "the mediate or immediate cause" of death. *Id.*

In Lichti v. State, 827 N.E.2d 82 (Ind. Ct. App. 2005), the defendant kidnapped John Barce, a seventy-three year old man and forced him to record a ransom demand; the victim "just died" without apparent cause and Lichti dumped the body in a field. Id. at 87-89. This Court affirmed Lichti's felony murder conviction, holding:

> "[T]he evidence is overwhelming that Lichti's conduct contributed to John's death in a reasonably foreseeable manner. By Lichti's own admission, he kidnapped John, an **elderly** man with heart problems, bound his arms and legs with duct tape, forced him to record a ransom message to his wife of over forty years

Id. at 93. Our Supreme Court affirmed this holding. Lichti v. State, 835 N.E.2d 478, 478 (Ind. 2005). In *Exum v. State*, 812 N.E.2d 204 (Ind. Ct. App. 2004), after the defendant had fled from the scene of a robbery, the robbery victim fired a handgun at defendant's confederates, who were also fleeing, killing one of them. *Id.* at 206. This Court affirmed Exum's conviction, finding that, "A victim of a forcible felony or unlawful entry of or attack on his dwelling fighting back with deadly force is such a natural consequence [of either act] that it has been justified by our State's legislature." *Id.* at 208 (citing LC. § 35-41-2-4). Consequently, "Exum should have reasonably foreseen that the crime of attempted robbery with deadly force was likely to create a situation where the death of one of his co-perpetrators from the victim's act of self-defense or defense of his dwelling would occur." *Id.*

***18** Similarly, in *Pittman v. State*, 528 N.E.2d 67 (Ind. 1988), a man who weighed 400 to 500 pounds suffered several non-fatal stab wounds during a robbery sought medical attention. *Id.* at 69. An exploratory surgery was performed, and complications ensued due to the victim's weight and immobility that created blood clots which blocked the victim's lungs, killing him. *Id.* Pittman's conviction for felony murder was affirmed by our Supreme Court, which held: "There is no question [the victim's] physical condition put him at much higher risk than one without the physical disabilities to withstand the trauma of the injuries inflicted by Pittman.,, , It has never been a defense that the victim would not have died from the wounds inflicted on him had it not been for his weakened physical condition." *Id* at 70

In *Booker v. State*, 270 Ind. 498, 386 N.E.2d 1198 (1979), Booker and his accomplice accosted and manhandled Ralph and Neva Hill, an **elderly** couple, while robbing them of a purse, watch, and wallet. *Id.* at 502. Defendants left the scene, and the Hills entered their home, where Ralph called his minister to say, "No, I'm not hurt. My shoulder hurts a little, but that's all. It's not important for you to come." *Id.* at 502. Afterwards, Ralph Hill collapsed and subsequently died from "a heart condition known as 'arrhythmia,' which the pathologist believed had been brought on by the physical and emotional stress occasioned by the robbery." *Id.* Ind. at 502, N.E.2d at 1201. Our Supreme Court held that Booker was rightly found guilty of felony murder because Ralph Hill's "death was a result of the circumstances of the attack." *Id.* Ind. at 504, N.E.2d at 1202.

Although several of these cases discuss guilt in terms of causation, they are relevant to the question of foreseeability, which requires that the commission of the qualifying felony give rise to "'a situation which would expose another to the danger of death."' ***19** *Palmer*, 704 N.E.2d at 126 (quoting *Sheckles*, 684 N.E.2d at 205). In such cases, "the creation of such a dangerous situation is an intermediary, secondary, or medium in effecting or bringing about the death of the victim." *Id.* (quoting Sheckle's, 684 N.E.2d at 205). Or, in the words of Jenkins, supra, these and other cases show that a felony murder conviction is appropriate when the qualifying offense occurred in "situation[s] that exposed persons present to the danger of death." *Jenkins*, 726 N.E.2d at 271. Such situations naturally vary. In *Pittman*, it was the decedent's extreme obesity. *Pittman*, 528 N.E.2d at 70. In *Lichti and Booker*, *supra*, the decedents' ages and the fact that robbery or kidnapping would produce stress justified felony murder convictions. Or, in the words of *Jenkins*, *supra*, these and other cases show that a felony murder conviction is appropriate when the qualifying offense occurred in "situation[s] that exposed persons present to the danger of death." *Jenkins*, 726 N.E.2d at 271. Such situations naturally vary. In Pittman, it was the decedent's extreme obesity. Pittman, 528 N.E.2d at 70. In *Lichti and Booker*, *supra*, the decedents' ages and the fact that robbery or kidnapping would produce stress justified felony murder convictions. *Lichti*, 827 N.E.2d at 93; Booker, Ind. at 504, N.E.2d at 1202. And in Palmer, Jenkins and Exum, supra, the situation was the interference of police or resistance by the victim. *Jenkins*, 726 N.E.2d at 271; *Palmer*, 704 N.E.2d at 125-126; Exum, 812 N.E.2d at 208.

These cases are irreconcilable with Sharp's new interpretation of the felony murder statute to require proof that a defendant was armed, or knew that his or her confederates were armed (Brief of Appellant, 17). Sharp does not explain whether this criteria would apply at the moment the qualifying offense is committed, or sometime thereafter. *See Turnley v. State*, 725 N.E.2d 87, 89 (Ind. 2000) (defendant armed himself with a knife taken from the victim's residence during the break-in). In any event, the defendant in Lichti was ***20** unarmed, as were the assailants in *Booker*. *Lichti*, 827 N.E.2d 88, 90-91; *Booker*, Ind. at 499-500, 504, N.E.2d at 1200, 1202. Sharp offers no reason to interpret the felony murder statute to protect defendants who manually strangle victims, or to absolve defendants who falsely claim to be armed and make threatening gestures, from liability (Brief of Appellant, 17). See Turnley, 725 N.E.2d at 89-90 (victim killed by manual strangulation). Sharp's additional proposed change to the felony murder statute -- a requirement that the defendant and his confederates "seek out a confrontation with another other individual" which produces in death -- is contrary to Exum, in which the defendant had already left the scene and his confederates were in full flight before the first shot was fired. Exum, 812 N.E.2d at 206. It is also clean contrary to Lichti and Booker, in which the uncontradicted evidence showed that the defendants sought a confrontation which would produce money, not death. *Lichti*, 827 N.E.2d 88, 90-91; *Booker*, Ind. at 499-500, 504, N.E.2d at 1200, 1202. Of course defendants who arm themselves and menace others with harm may be guilty of felony murder. Jenkins, 726 N.E.2d at 271; Palmer, 704 N.E.2d at 126. But Sharp offers no reason to overthrow decades of holdings from this Court and our Supreme Court to make premeditated, armed assault the sine qua non of guilt under the felony-murder statute.

To the extent that Sharp's argument may be read to challenge the sufficiency of the evidence under existing law, such an argument would also fail. Quiroz and his companions knew that burglarizing occupied homes was hazardous (Tr. 884). They prowled the neighborhood looking for unoccupied homes (Tr. 603-04, 608, 754, 933). They summoned Sharp and Johnson for help in breaking into Scott's house (Tr. 934). They were aware of the risk that even if Scott's house was unoccupied, the burglary would be interrupted by police or returning residents, and so they posted Sparks as lookout and equipped him with ***21** the means to alert Quiroz (Tr. 582-83, 943-44; Exhibit 14A). This is sufficient evidence of foreseeability. *See Palmer*, 704 N.E.2d at 126 (foreseeable that officers would intervene); Exum, 812 N.E.2d at 206 (foreseeable that homeowner would use force to repel an attack on his dwelling). Even if more were needed, the evidence shows that after the group had battered down Scott'S kitchen door and entered his home, Sharp armed himself with a knife that he took from Scott'S kitchen counter (Tr. 550-51, 577-78, 602-03, 615, 622, 653, 769-70, 1088-89; Exhibits 1, 8, 11, 21-22). [5] See Turnley, 725 N.E.2d at 89 (affirming conviction where defendant's companion armed himself with a knife taken from the residence during the break-in). The evidence is sufficient to show that Sharp's conduct occurred in "'a situation that exposed persons present to the danger of death." *Jenkins*, 726 N.E.2d at 271.

C). Sharp's reinterpretation of the felony-murder statute to require that a defendant committed murder is contrary to binding precedent and the language of the felony-murder statute.

Sharp'S second argument invites this Court to overrule Indiana'S consistent interpretation of the felony-murder statute and hold that a defendant cannot be guilty of felony murder unless he himself kills another (Brief of Appellant, 21). Our Supreme Court has repeatedly rejected Sharp's reading of the felony-murder statute. *Palmer*, 704 N.E.2d at 126; *Pittman*, 885 N.E.2d at 1258; *Lichti v. State*, 835 N.E.2d at 478, *affirming*, *Lichti*, 827 N.E.2d at 88-90; *Jenkins*, 726 N.E.2d at 270; *Lacey*, 755 N.E.2d at 578 n.l. This Court ***22** cannot overrule our Supreme Court. *Horn v. Hendrickson*, 824 N.E.2d 690, 694 (Ind. Ct. App. 2005).

Nonetheless, the State would note that Sharp's nonsensical interpretation of felony-murder merely dissolves that offense into murder (Brief of Appellant, 21). This is contrary to the intent and plain meaning of the felony murder statute. "In Indiana, statutes are passed without recorded legislative history by which we may determine the legislature's intent." *Goldsberry v. State*, 821 N.E.2d 447, 465 (Ind. Ct. App. 2005). Instead, the "best evidence" of Legislative intent "is a statute's text." *Adams v. State*, 960 N.E.2d 793, 798 (Ind. 2012). Our Legislature provided that murder is committed by one who "knowingly or intentionally kills another human being," and distinguished that offense from felony murder, which is committed by one who "kills another human being while committing or attempting to commit" specified offenses, none of which are murder. I.C. § 35-42-1-1(1) & (2). The Legislature did not require that a defendant who commits felony murder have "knowingly or intentionally kill[ed]," only that he or she knowingly commit a qualifying offense in which another human being is killed. *Id.* [6]

The statute shows the Legislature's intent to hold the commission of qualifying offenses which produce death to a more severe judgment, no doubt because the qualifying offenses do not necessarily require the infliction of death. I.C. § 35-42-1-1(2). Even without the repeated holdings of our Supreme Court and this Court, it remains that only the Legislature can define crimes. I.C. § 1-1-2-2; *Carr v. State*, 93 N.E. 1071, 1072 (Ind. 1911). ***23** Our Supreme Court's interpretation of the felony murder statute binds this Court, which should affirm Sharp's conviction.

III. Sharp's advisory sentence is not inappropriate to his offense and character.

This Court will only revise a sentence if, upon "due consideration of the trial court'ss decision" it nonetheless appears that "the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B); *Anglemyer v. State*, 868 N.E.2d 482, 490-91 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (2007). The "nature of the offense" refers to the defendant's acts in comparison with the elements of his offense, *Cardwell v. State*, 895 N.E.2d 1219, 1224 (Ind. 2008), while the "character of the offender" refers "general sentencing considerations and the relevant aggravating and mitigating circumstances." *Douglas v. State*, 878 N.E.2d 873, 881 (Ind. Ct. App. 2007). "Because reasonable people will differ as to the appropriate sentence in any given case," this Court will "refrain from merely substituting [its] opinions for those of the trial court." *Everroad v. State*, 701 N.E.2d 1284, 1286 (Ind. Ct. App. 1998). "The principal role of such review is to attempt to leaven the outliers," and is not intended to achieve a perceived "correct" sentence. *Chambers v. State*, 989 N.E.2d 1257, 1259 (Ind. 2013); *Cardwell v. State*, 895 N.E.2d 1219, 1225 (Ind. 2008). Sharp bears the burden to show that his sentence is inappropriate. *Rutherford v. State*, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007).

Sharp's burden is even higher, because he received the advisory sentence (Tr. 1324). I.C. § 35-50-2-3. A defendant "bears a particularly heavy burden in persuading [this Court] that his sentence is inappropriate when the trial court imposes the advisory sentence." *Fernbach v. State*, 954 N.E.2d 1080, 1089 (Ind. Ct. App. 2011), *trans. denied.* Sharp has not carried this burden with respect to the nature of his offense (Brief of Appellant, 24). ***24** Instead, Sharp incorrectly claims that his offense is burglary and that his sentence should be gauged according to the elements of that offense (Brief of Appellant, 24). The "basic" nature" of Sharp's offense is felony murder (Tr. 1324). The evidence shows that Sharp was summoned to participate in the offense by Quiroz, and that Sharp responded to Quiroz's call for help in breaking into Scott's house (Tr. 721-22, 934). Sharp was fully aware of what the group intended to do when the five of them crossed Frances Avenue to break into Scott's house (Tr. 972).

The offense was directed at a location that had been scouted beforehand, and the offense was well-planned, with arrangements for a lookout and communication by cell phone (Tr. 582-83, 755-57, 930, 943-44; Exhibit 14A).

After the group had battered down Scott's kitchen door and entered his home, Sharp armed himself with a knife he took from Scott's kitchen counter (Tr. 550-51, 577-78, 602-03, 615, 622, 653, 769-70, 1088-89; Exhibits 1, 8, 11, 21-22). Either Sharp armed himself upon entry because he was ready for mayhem, or Sharp decided to confront Scott with a knife in hand when Sharp perceived Scott coming down the stairs or into the dining room area (Tr. 1072, 1074). In the latter case, it might be observed that Sharp fled when he realized that he was out-matched by the gun Scott was holding to his side (Tr. 1075, 1106). One need not indulge in such arguments, however, to know that Sharp's willingness to use a deadly weapon proves that, contrary to Sharp's assertion, his participation in this offense was not “minimal” (Brief of Appellant, 24). Sharp has not shown that the nature of his offense warrants less than the advisory sentence.

Sharp has also failed to demonstrate that his character warrants a reduction in his advisory sentence (Brief of Appellant, 24-26). As the trial court noted, Sharp was an adult who joined three juveniles in the participation of this offense (Tr. 929, 940, 1321). As the ***25** trial court said, “You lead them down the wrong path, Mr. Sharp, by your acts (Tr. 1321). Sharp was eighteen years old when he committed this offense (App. 166). His juvenile record held four incidents of illegal conduct, including a theft and marijuana abuse, suspension from school, and an unsatisfactory discharge from juvenile probation (Tr. 1309-10; App. 98-102, 166), These juvenile matters resulted in numerous impositions of lenient sanctions in an attempt to redirect Sharp's life (Tr. 1320; App. 98-102, 166). They failed, as evidenced by Sharp's juvenile recidivism and his use of marijuana in the years before the burglary, including Sharp's use of marijuana on the day of Johnson's death (App. 98-102).

These facts warrant an advisory sentence. Sharp's contrary arguments are unpersuasive, the more so because they include a claim that the trial court found that he expressed “genuine remorse” over Johnson's death and Sharp's own “role in contributing to that death” (Brief of Appellant, 25). At sentencing, Sharp said he was not involved in the burglary; “I'm truly sorry for his [Johnson's] actions and others actions”; and “I would like to apologize to Rodney Scott for my friends' action” (Tr. 1311, 1312, 1318). Sharp also said he “would like to apologize to Blake's [Layman's] family, Levi [Sparks'] family and Jose' [Quiroz's] family for they actions as well” (Tr. 1312). The trial court noted:

> There is the case of Mr. Quiroz. He accepted responsibility by pleading guilty to his involvement in the case. He told the Court that he committed this felony murder. He got as a substantial mitigator in is sentence a lesser sentence. He got credit for accepting responsibility. That's not the case here... . I cannot give you, I cannot give you the benefit of this substantial mitigated sentence because you accepted responsibility because you didn't accept responsibility.

(Tr. 1323). While the court considered Sharp's expressed condolences to Johnson's family, and commiseration with the families of the other defendants, to be somewhat mitigating, the trial court properly did not find that Sharp expressed any remorse for contributing to the ***26** burglary and Johnson's death (App. 98-102; Tr. 1323). Sharp has failed to demonstrate that his advisory sentence is inappropriate to both his offense and his character, and the trial court should therefore be affirmed. Ind. App. R. 7(B).

CONCLUSION

For the foregoing reasons, the State respectfully urges that the trial court be affirmed.

Footnotes

1 Ind. Code § 35-42-1-1(2).

2 Scott's testimony to this thought was given under a limiting instruction that prevented the jury from considering it for any purpose other than Scott's thought processes (Tr. 1068-70).

3 A printout of the messages taken from McKeown's cell phone, redacted to omit irrelevant communications, was introduced into evidence as Exhibit 39 (Tr. 1000). The printout lists times for messages, but McKeown explained that the times did not accurately reflect the order of the messages due to delays relaying messages to her while she was in the school building (Tr. 993). McKeown reviewed the message printout and her testimony provides the correct order of the messages (Tr. 993, 995, 998).

4 While a waived claim may be reviewed for "fundamental error," which is an extremely narrow exception to the rule of waiver, *Sobolewski v. State*, 889 N.E.2d 849, 856 (Ind. Ct. App. 2008), Sharp's arguments do not rely on this exception (Brief of Appellant, 16-18, 19-20). Review for fundamental error is likewise waived. *Curtis v. State*, 948 N.E.2d 1143, 1148 (Ind. 2011); *Hollingsworth v. State*, 987 N.E.2d 1096, 1099 (Ind. Ct. App. 2013), trans. denied.

5 Sharp did not need a knife to flee the house, and so any argument that he might have armed himself in order to run away is sheer speculation that is contrary to the standard of review. *Craig*, 730 N.E.2d at 1266. Nonetheless, it may be observed that the evidence taken favorably to the verdict shows that Sharp discarded the incriminating knife when he became aware that he was not going to be immediately apprehended, which indicates a consciousness of guilt (Tr. 618). *See Washington v. State*, 273 Ind. 156, 160, 402 N.E.2d 1244, 1248 (1980) (providing that attempts to conceal or suppress implicating evidence is relevant as revealing consciousness of guilt).

6 Indeed, if there is any interpretative room in the language requiring that a qualifying offense have "kill[ed] another human being" it would be to regard that as a strict-liability element. *See Walker v. State*, 668 N.E.2d 243, 244-45 (Ind. 1996) (holding that offense enhancement for presence near a protected zone is a strict-liability element). Given the binding authority of our Supreme Court, however, the State does not advance such an interpretation to this Court.

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